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No. 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 195

RESERVE LIFE INSURANCE COMPANY, a corporation,
Petitioner,

v.

DR. E. H. NORTH, JR.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

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No.

RESERVE LIFE INSURANCE COMPANY, a corporation,
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v.

DR. E. H. NORTH, JR., *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment herein of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is printed in the Appendix hereto (App. 1a). It is reported at 255 F. 2d 240. The opinion of the District Court, reported at 155 F. Supp. 249, is printed in the

Appendix hereto (App. 5a) as well as at pages 11-14 of the appendix to appellant's brief before the Court of Appeals, submitted herewith (R. 11-14).*

JURISDICTION

The judgment of the Court of Appeals was entered on April 21, 1958. Rehearing was denied June 13, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Does not the decision of the Court of Appeals in this case involving a question of far-reaching importance conflict in principle with decisions of this Court as well as applicable principles of state law so that review by this Court is desirable if not necessary?

STATEMENT

This case began as an action for damages for fraud brought by petitioner insurance company against respondent, Dr. E. H. North, Jr. Petitioner is a resident of the State of Texas; respondent a resident of the State of North Carolina. Suit was brought in the United States District Court for the Eastern District of North Carolina, Elizabeth City Division, based on diversity of citizenship.

On September 21, 1951, petitioner issued hospitalization policy No. R-908861 to one John M. Cudworth (R. 5, 22). Said policy was renewable on January 21,

* Nine copies of the appendices to the briefs of both appellant and appellee before the Court of Appeals have been submitted to this Court with this petition. References to the appendix to appellant's brief are designated "R." and references to the appendix to this petition, "App."

1952 (R. 31), and it expressly provided that it was "renewable at the option of the Company only." (R. 145).

From November 23, 1951, to December 2, 1951, a date approximately two months after issuance of the policy, John M. Cudworth was confined in the Albemarle Hospital, Elizabeth City, North Carolina, under the care and treatment of respondent as attending physician (R. 5). At, or sometime after, Cudworth's admission to the hospital, respondent made the following entries on the hospital admission records with regard to Cudworth:

"DIAGNOSIS AND COMPLICATIONS

MAIN: *Probable Pulmonary Tuberculosis*

SECONDARY AND ASSOCIATED:

Poss Bronchogenic Carcinoma" (R. 12)

But on December 2, 1951, the date of Cudworth's discharge from the hospital, respondent filled out the Physician's Hospitalization Statement for the information of petitioner insurance company in part as follows:

"I, *Doctor E. H. North, Jr.*, have treated John M. Cudworth.

* * * * *

"2. Nature of sickness or disease? (List all)

Pneumonia — Type uncertain

* * * * *

"d. To what do you attribute the cause of the disease or condition?

Nothing specific" (R. 160-161)

At the time of issuance of the policy, petitioner had no information concerning the insured other than that contained in the application (R. 16). On the basis of the information contained in respondent's statement, petitioner paid Cudworth's hospital bill in the amount of $76.50 (R. 25) and renewed his policy when it would ordinarily have expired on January 21, 1952 (R. 31). If respondent's report had contained the true facts—that Cudworth had been hospitalized for probable pulmonary tuberculosis and possible bronchogenic carcinoma—petitioner would neither have paid the claim for the first hospitalization (R. 29) nor renewed the policy (R. 31). Neither claims for tuberculosis nor claims for carcinoma can be paid unless hospital confinement begins after the first six months of the policy (R. 154).

In the spring of 1952, after the initial six-month period of the policy had expired, Cudworth entered the Norfolk General Hospital where he died of carcinoma. As a result of this second hospitalization, petitioner was compelled to pay an additional $1,643.72 in benefits under the policy (R. 28).

The present action for damages for fraudulent misrepresentation resulted in a judgment in favor of respondent (R. 14). The District Court opinion made no attempt to illuminate the important relationship of trust existing between a doctor and an insurance company in this circumstance. The Court of Appeals affirmed.

REASONS FOR GRANTING THE WRIT

The Decision of the Court of Appeals, in a Matter of Great Importance, Conflicts in Principle With Decisions of This Court as Well as Applicable State Law So That Review by This Court Is Called For

The decision below involves a simple but fundamental issue of law. The issue is of vital importance to the insurance industry, the medical profession and to millions of policyholders throughout the country.

Hospitalization insurance is today an American institution. The amount of such insurance in force runs to billions of dollars; it affects every strand in the fabric of American life. In the conduct of this business, great reliance is placed on doctors of medicine. If this reliance is to continue, the relationship of the individual doctor to the insurance company relying on his word should be defined by the authoritative pronouncement of this Court. If the reliance is not to continue, a wholesale revision of the current procedures for administering hospitalization insurance is in order. Such a revision must necessarily involve substantially increased investigatory measures by the insurance industry. This can result only in additional costs of millions of dollars annually, sums which must ultimately be paid by the individual policyholders themselves.

In the present case petitioner followed the usual procedure, the procedure followed by hundreds of other insurance companies in hundreds of claims processed each day. It relied completely on the word of respondent as the attending physician. Respondent in his signed report to the insurance company stated unequivocally that he had treated the insured merely for "pneumonia" and attributed the condition

to "nothing specific". In filling out the hospital records at substantially the same time, respondent diagnosed the insured's condition as "probable pulmonary tuberculosis" and "poss[ible] bronchogenic carcinoma". At no place in Cudworth's *hospital* record did Dr. North make a single reference to "pneumonia", the disease which he told the insurance company was the principal reason for treatment.

Approximately five months after Dr. North's report, the insured died of bronchogenic carcinoma precisely the diagnosis made by Dr. North and entered on the hospital records of the insured's earlier confinement but carefully omitted from the doctor's report to the insurance company. It has been conclusively established that the company suffered damages as a result of its reliance on respondent's report.

These are the essential facts. The significant legal issue they present is whether or not a doctor has a duty of full and complete disclosure to an insurance company where, as in the circumstances of this case, he knows that great reliance will undoubtedly be placed on his word. This issue is illuminated by prior decisions of this Court and the Supreme Court of North Carolina.

This Court has long recognized that whoever perpetrates fraud to the injury of another is liable therefor, *Nudd* v. *Burrows*, 91 U.S. 426. The closest analogy to the present case is found in fraudulent recommendations of credit where it is the rule that a fraudulent recommendation will subject the person giving it to the damages sustained by the person trusting to it, *Russell* v. *Clark's Executors*, 7 Cranch 69. The writer of a letter recommending credit to a

third person is liable for a false impression made and authorized by the letter which was intended by the writer to deceive and mislead the addressee, *Iasigi* v. *Brown*, 17 How. 183.

With regard to the intent or state of mind necessary to constitute an actionable wrong, this Court has held that misrepresentation of a material fact, although made by mistake, will give a right to damages, *M'Ferran* v. *Taylor*, 3 Cranch 270. In law a statement recklessly made, without knowledge of its truth, but which is in reality false, is a false statement knowingly made, *Cooper* v. *Schlesinger*, 111 U.S. 148. Of even closer application to the present issue is the case of *Lehigh Zinc & Iron Co.* v. *Bamford*, 150 U.S. 665, where it was held that there need not be knowledge of the falsity of representations to hold one liable where he is *presumed* to know the facts.

In the *Lehigh* case this Court approved an instruction stating that "a person who makes representations of material facts, assuming or intending to convey the impression that he has actual knowledge of the existence of such facts, when he is conscious that he has no such knowledge, is as much responsible for the injurious consequences of such representations, to one who believes and acts upon them, as if he had actual knowledge of their falsity:" 150 U.S. at 673.

In *Gordon* v. *Butler*, 105 U.S. 553, this Court recognized that an action will lie for giving a false opinion in the case of a party possessing special learning or knowledge on the subject in respect to which his opinion is given.

Each of these cases is in principle directly applicable to the present case where respondent,

possessed of specialized knowledge and acting in a position of trust, gave a professional statement of fact under circumstances utterly inconsistent with the high standard to which he should be held.

Nor does the result reached by the courts below find support in the law of the State of North Carolina. Although both the District Court and the Court of Appeals refused to recognize that a doctor occupies a fiduciary position with regard to an insurance company in cases of this sort, it seems probable that the law of North Carolina would uphold the existence of such a relationship.

In *Abitt* v. *Gregory*, 201 N.C. 577, 160 S.E. 896, the court stated that a fiduciary relationship exists "in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence." 160 S.E. at 906. As the court noted in *Vail* v. *Vail*, 233 N.C. 109, 63 S.E. 2d 202, this relationship exists wherever "confidence on one side results in superiority and influence on the other side." 63 S.E. 2d at 206. In *Hinton* v. *West*, 207 N.C. 708, 178 S.E. 356, the court cites with approval the statement in 25 C.J. 1149 that the fiduciary relationship "extends to any possible case in which a fiduciary relation exists in fact." 178 S.E. at 360.

The relationship between petitioner and respondent in the present circumstances makes it clear that special confidence was reposed in respondent. Any realistic view of this relationship must recognize that it has, in fact, all the characteristics of a fiduciary relation. It should be accorded this legal status if properly viewed under the law of North Carolina.

CONCLUSION

This case is of far-reaching importance. No real attempt has been made either by the District Court or by the Court of Appeals to define the relationship between a doctor of medicine and an insurance company under the circumstances presented here. The decision below finds no support in cases decided by this Court or in the applicable law of North Carolina and conflicts with principles on which these controlling cases are based. For the foregoing reasons the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7586

RESERVE LIFE INSURANCE COMPANY, *Appellant*,

v.

DR. E. H. NORTH, JR., *Appellee*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA AT ELIZABETH CITY.

(Argued April 8, 1958. Decided April 21, 1958.)

Before SOBELOFF and HAYNSWORTH, *Circuit Judges*, and THOMSEN, *District Judge*.

THOMSEN, *District Judge*:

Plaintiff insurance company appeals from a judgment for defendant doctor in an action for damages based upon defendant's alleged fraud in filling out a physician's hospitalization statement for a patient insured by plaintiff. The district judge heard the case without a jury and filed an opinion, 155 F. Supp. 249.

The insured, John M. Cudworth, was admitted to a hospital in Elizabeth City, N. C., on November 23, 1951, as defendant's patient. He was first seen by defendant on November 14, 1951, after he had complained of a hacking cough and fatigue for some time and had been treated by

another doctor for an upper respiratory infection with some infiltration or congestion in the lungs, which defendant considered to be pneumonia. After the acute stage had passed and the fever had gone, the congestion remained. Defendant thought the condition was probably caused by pulmonary tuberculosis or possibly by bronchogenic carcinoma, so he had Cudworth admitted to the hospital for various tests and laboratory analyses. The tests showed no evidence of tuberculosis, and Cudworth was discharged on December 2, to return in ten days for another x-ray and possible bronchoscopic examination.

On December 2 defendant filled out a physician's hospital statement on a printed form furnished to Cudworth by plaintiff. In answer to the question: "Nature of Sickness or Disease? List all.", defendant wrote: "Pneumonia—Type uncertain"; he stated that in his opinion the cause of the condition had existed one week before he was consulted on November 15, 1951, and answered "No" to the question: "Does history indicate that he has had previous symptoms?" To the question: "To what do you attribute the cause of the disease or condition", he answered "Nothing specific".

Defendant continued to see Cudworth until January, 1952, but since an x-ray showed that the congestion had improved, he did not call for a bronchoscopic examination. In March, 1952, Cudworth was admitted to a hospital in Norfolk, his condition was diagnosed as carcinoma of the lung, and he died of that disease in May 1952.

Plaintiff had issued a Hospital and Surgical Expense Policy to Cudworth on September 21, 1951. It covered hospitalization resulting from sickness the cause of which originated more than fifteen days after the date of issue, except that tuberculosis, cancer, and certain other diseases were covered only if hospital confinement should begin

after the policy had been in force for six months or more. The policy was renewable at the option of the Company only.

Plaintiff claims that as a result of defendant's fraud in filling out the statement on December 2, 1951, it paid out $76.50 for the November hospitalization, renewed the policy in March, 1952, and was forced to pay out $1,643.72 for benefits and costs of defending a suit arising out of the hospitalization in the spring of 1952. It also claims $10,000 punitive damages for gross fraud. Plaintiff contends that defendant falsely and fraudulently, and in reckless disregard for the truth (a) misrepresented to plaintiff the nature and duration of the sickness or disease for which Cudworth had been hospitalized and treated in November, 1951, and (b) failed to disclose to plaintiff "that Cudworth had been hospitalized for diagnosis and that in his professional opinion the nature of Cudworth's sickness or disease was probable pulmonary tuberculosis and possible bronchogenic carcinoma".

The district judge found "that the evidence does not clearly establish in accordance with the plaintiff's burden of proof that the defendant's statement was made either with knowledge of its falsity or with a reckless disregard for its truth. As a fact essential to the plaintiff's right to recover has not been established, the plaintiff's claim must be denied." 155 F. Supp. at 250. See also *Early* v. *Eley*, 243 N.C. 695.

We cannot say that this finding of the district judge was erroneous. It is true that the hospital record does not mention pneumonia as such, and shows the diagnosis to have been "Probable Pulmonary Tuberculosis" and "Poss Bronchogenic Carcinoma". On the other hand, the tests were negative for tuberculosis, carcinoma was only suspected, and the history in the hospital record showed "infiltration right apex" and other symptoms of pneumonia. Plaintiff's

printed form did not ask the doctor to list diseases which had been shown not to exist or which were only suspected. The doctor did not know the provisions of the policy. Of course, he was bound to answer the questions honestly and with reasonable care, but plaintiff's argument that defendant was in a fiduciary relationship with plaintiff is not supported either by reason or by authority. He had no contract with plaintiff and was not making an examination to determine whether a policy should be written or renewed. Even if a fiduciary relationship had existed, it would not have eliminated the burden which rested on plaintiff to prove that defendant's statement was made either with knowledge of its falsity or with reckless disregard for its truth. We agree with the district judge that plaintiff has failed to meet that burden.

Affirmed.

Judgment of the Court of Appeals

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7586

RESERVE LIFE INSURANCE COMPANY, *Appellant*,

v.

DR. E. H. NORTH, JR., *Appellee*.

APPEAL FROM the United States District Court for the Eastern District of North Carolina.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of North Carolina, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed with costs.

April 21, 1958.

MORRIS A. SOPER
United States Circuit Judge.

Opinion and Judgment of the District Court

RESERVE LIFE INSURANCE COMPANY, *Plaintiff*

v.

DR. E. H. NORTH, JR., *Defendant*.

Civ. No. 975

United States District Court, Eastern District North Carolina, Elizabeth City Division, October 17, 1957.

GILLIAM, *District Judge*.

This cause comes on to be heard upon the complaint of the Reserve Life Insurance Company, plaintiff, alleging actual damages to the extent of $1,720.22 as the result of a fraud practiced upon it by the defendant, Dr. E. H. North, Jr. Plaintiff further alleges that the fraud in question constitutes such outrageous conduct as to warrant an award of $10,000.00 punitive damages.

The facts in the case appear to be as follows:

On November 23, 1951, one John M. Cudworth was admitted to the Albemarle General Hospital as the patient of the defendant. For some time prior to his hospitalization Cudworth had complained of a chest cold, hacking cough, and fatigue. It is assumed, without deciding on the basis of the vague and conflicting evidence, that at the time of Cud-

worth's admission the defendant entered the following upon the hospital admission records under the appropriate headings:

"DIAGNOSIS AND COMPLICATIONS

"MAIN: Probable Pulmonary Tuberculosis

"SECONDARY AND ASSOCIATED: Poss Broncogenic Carcinoma"

During the period of his confinement to the hospital (November 23, 1951 to December 2, 1951), and in accordance with the defendant's instructions, Cudworth was the subject of medical treatment, tests, and laboratory analysis, the purpose of which was to determine whether he was the victim of either of the two suspected diseases or any other disease.

Cudworth was discharged from the hospital on December 2, 1951. At that time the defendant entered upon the hospital records as follows:

"12/2/1951—Patient discharged today after a negative work up for tuberculosis — all sputum, gastric washing, manitoux, and the patch test all negative. To have re-ray in 10 days, then poss broncoscopic."

On the day of Cudworth's discharge the defendant filled out for the plaintiff a Physician's Hospitalization Statement. Among others this Statement contained the following questions and answers;

"2. Nature of sickness or disease? (list all)
Pneumonia—type uncertain."

"d. To what do you attribute the cause of disease or condition? *Nothing specific.*"

Plaintiff, in reliance upon the foregoing questions and answers, paid a claim of $76.50 and subsequently renewed the policy in question.

If the defendant had answered in the aforementioned Physician's Hospitalization Statement that the nature of Cudworth's disease was probably pulmonary tuberculosis or possibly broncogenic carcinoma, or if he had stated that he attributed the cause of Cudworth's disease or condition to the same, the plaintiff, under the terms of the policy, would neither have incurred the obligation of $76.50 as a result of that confinement nor would have renewed the policy.

In the spring of 1952, subsequent to his discharge from the Albemarle General Hospital on December 2, 1951, Mr. Cudworth died as a result of carcinoma following an operation for the removal of the diseased part of the lung. Carcinoma was established as the cause of death by pathological examination subsequent to this operation. The hospital confinement preceding this terminal operation resulted in the plaintiff being sued under the terms of the renewed insurance policy with the consequent expense of $1,643.72.

The plaintiff contends that the defendant's statement to the effect that the nature of Cudworth's disease or sickness was pneumonia of an uncertain type caused by nothing specific was made with knowledge of its falsity or with a reckless disregard for its truth. Knowledge of falseness or reckless disregard for the truth is an essential element in the plaintiff's cause of action (Early v. Eley, 243 N. C. 695), for in law fraud consists of: 1. A false material representation; 2. Made with knowledge of its falseness or with a reckless disregard for its truth; 3. With the intention that the other party rely upon the same; and 4. Which is reasonably relied and acted upon by the party to his damage.

Although conflicting, the evidence suggests that the defendant suspected that Cudworth's illness upon his admission to the hospital was possibly caused by either carcinoma or tuberculosis. Upon receiving negative results from testing the patient for the same, the defendant eliminated them

in his mind as being the nature of Cudworth's illness, and this was the status of the defendant's mind at the time the Physician's Hospitalization Statement was completed.

In view of its tendency in this direction, it is the opinion of the Court that the evidence does not clearly establish in accordance with the plaintiff's burden of proof that the defendant's statement was made either with knowledge of its falsity or with a reckless disregard for its truth. As a fact essential to the plaintiff's right to recover has not been established, the plaintiff's claim must be denied.

Therefore, it is adjudged that plaintiff recover nothing and that defendant recover costs.

Order Overruling Petition for Rehearing

Filed and Entered June 13, 1958.

(Style of Court and Title Omitted.)

A petition for rehearing was filed by the appellant in the above entitled case, the Court having extended the time within which petitions for rehearing must be filed under the rules. The petition for rehearing has now been filed and has been considered by the Court and the Court is of the opinion that it raises no questions other than those already passed upon and decided against the appellant in the opinion of this Court heretofore filed.

WHEREFORE, the petition for the rehearing is hereby overruled.

June 13th, 1958.

MORRIS A. SOPER
United States Circuit Judge

CLEMENT F. HAYNSWORTH, JR.
United States Circuit Judge

ROSZEL C. THOMSEN
United States District Judge

OCT 2 1958
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 353

RESERVE LIFE INSURANCE COMPANY, a corporation,
Petitioner

v.

DR. E. H. NORTH, JR., *Respondent*

BRIEF FOR RESPONDENT IN OPPOSITION

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No. 353

RESERVE LIFE INSURANCE COMPANY, a corporation,
Petitioner

v.

DR. E. H. NORTH, JR., *Respondent*

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Where a purely non-federal cause of action based upon alleged "gross fraud" has been tried by a United States District Court under applicable state law and decisions, affirmed on appeal by the United States Court of Appeals, should certiorari be granted?

STATEMENT OF THE CASE

Petitioner was the plaintiff in the courts below, and respondent is and was a highly respected medical doctor, practicing in Elizabeth City, N. C. This action was brought in the U. S. District Court for the Eastern District of North Carolina, at Elizabeth City, jurisdiction being based upon diversity of citizenship.

(P. Ap. will apply to plaintiff's appendix to brief, and D. Ap. will apply to defendant's appendix to brief.)

In September, 1951, plaintiff issued a hospital and surgical expense policy to one Cudworth, who was thereafter a patient of the defendant doctor between the dates of November 23, 1951, and December 2, 1951. The defendant had treated the patient for pneumonia. The doctor did not at any time diagnose Cudworth's condition as being either tuberculosis or carcinoma. (D. Ap. 9-10.)

Plaintiff had alleged fraud predicated upon defendant's failure to include tuberculosis and carcinoma in the Company's printed form (Plaintiff's Exhibit 7) which the defendant doctor had filled in on the day the patient was discharged from the hospital. The form (P. Ap. 160) called for the *sicknesses* for which the doctor had *treated* the patient. While the patient was in the hospital the doctor suspected pulmonary tuberculosis or possible bronchogenic carcinoma. Various tests were made, and, based upon the negative results, the suspicion was removed and the doctor never at any time diagnosed Mr. Cudworth's condition as being either tuberculosis or carcinoma. (D. Ap. 9). The treatment administered Mr. Cudworth while a patient in the hospital was for pneumonia. He had symptoms of this disease before he was sent to the hospital and while there. "If I had thought that he probably had tuberculosis or possibly had carcinoma, as his attending physician, I would not have discharged him on December 2, 1951, and let him go home. (D. Ap. 13). I approached the completion of this paper identified as P-7, from a view-

point of what I treated Mr. Cudworth for and what I knew he had." (D. Ap. 16).

The defendant testified, without contradiction, that the diagnostic hospital record, upon which plaintiff predicates the alleged fraud, could easily have been made up many months after the November-December, 1951, confinement, and could even have been made up after Mr. Cudworth's death. (D. Ap. 14; 22-23). Cudworth had not been defendant's patient in March and April of 1952, at which time Cudworth was a patient of other doctors in Norfolk, Virginia, and it was only after surgery there that carcinoma was found. It was also definitely determined at that time that the patient did not have tuberculosis.

At the time the defendant doctor filled in the hospital form complained of, he knew nothing of the contents of any policy of insurance which the patient might have had with the plaintiff company. The amount then involved was $76.50, in no part of which the defendant doctor had any pecuniary interest.

The remaining actual damages alleged by plaintiff, $1643.72, represented largely attorneys' fees paid by plaintiff in unsuccessfully defending a suit in a North Carolina State Court, brought on the hospital policy by the insured's administrator for hospital and medical expenses incurred after the insured ceased to be a patient of the present defendant.

In the instant suit, the jurisdictional requirement as to amount involved was allegedly met by incorporating punitive damages.

A jury trial was waived, and, among other facts, the District Judge found the following key fact:

> "Upon receiving negative results from testing the patient for the same (carcinoma or tuberculosis) the defendant eliminated them in his mind as being the nature of Cudworth's illness, and this was the status of the defendant's mind at the time the Physician's Hospitalization Statement was completed. In view of its tendency in this direction, it is the opinion of the Court that the evidence does not clearly establish in accordance with the plaintiff's burden of proof that the defendant's statement was made either with knowledge of its falsity, or with a reckless disregard for its truth." (P. Ap. 14).

Good faith is peculiarly pertinent in a fraud charge. The trial Court had, among others, this evidence of the defendant doctor:

> "I have never made reports or statements to the plaintiff in reference to Mr. Cudworth which were not based upon my honest opinion and conviction as a doctor. I have never knowingly withheld any information from the plaintiff company. I have never made any representation to the plaintiff company in referring to Mr. Cudworth, not caring or knowing whether they were true or false. I have at all times acted in good faith with the plaintiff company, especially in regard to Mr. Cudworth in his hospitalization in 1951." (D. Ap. 36-37, narrated).

ARGUMENT

The case was tried, and reviewed on appeal, under applicable North Carolina decisions as to actionable fraud, and presents no situation contemplated by Rule 19 of this Court:

(1)

We do not understand that petitioner claims in its brief or otherwise that the asserted cause of action is not local in nature and controlled by North Carolina decisions.

In non-federal matters, of course, the elements of fraud are now determined by state law.

Moore's Federal Practice, Vol. 2, at p. 1907.

Long before *Erie Railroad Co.* v. *Tompkins*, 304 US 64, this Court had held that questions in relation to fraud are generally regarded as local questions, as to which decisions of the state court are controlling.

Dooley v. *Pease*, 180 US 126.

The trial Court in its judgment (P. Ap. 14) had set out the four requisites of actionable fraud as enumerated in *Harding* v. *Insurance Co.*, 218 NC 129, 10 SE 2d. 680, one of which was "made with knowledge of its falseness or with a reckless disregard for its truth."

To the same effect is the more recent North Carolina case, also cited in the judgment, *Early* v. *Eley*, 243 NC 695; 91 SE.2d. 919.

There is no suggestion in plaintiff's petition, and rightly so, of absence of evidence to support this crucial finding in the trial Court's judgment:

> "Upon receiving negative results from testing the patient for the same (tuberculosis and carcinoma) the defendant eliminated them in his mind as being the nature of Cudworth's illness, and this was the status of the defendant's mind

at the time the Physician's Hospitalization Statement was completed." (P. Ap. 14).

If this Court's definition of actionable fraud were controlling, petitioner could find no consolation therein. Six elements were stated in *Southern Development Co.* v. *Silva*, 125 US 247, one of those requisites was "That such representation was not actually believed by the defendant, on reasonable grounds."

(2)

Whether there was or was not a trust relationship between plaintiff and defendant, as related to the law of fraud, is not controlling on this record.

A trust relationship only dispenses with the proof of one of the fraud elements, i.e., the intention to deceive.

> *Miller* v. *Bank*, 234 NC 309, 316; 67 SE 2d 362; 37 C.J.S. 211.

As was said in the *Miller* case, *supra*, constructive fraud differs from active fraud in that the intent to deceive is not an essential element, but it is nevertheless fraud though it rests upon presumption arising from breach of fiduciary obligation rather than deception intentionally practiced.

In the *Miller* case, *supra*, the plaintiff had alleged "a breach of the fiduciary obligation", etc. It is interesting to observe that fiduciary relationship, so much relied upon by petitioners in retrospect, is not even alleged in its complaint, though FRCP 9(b) requires that the circumstances constituting fraud shall be stated with particularity.

Actionable fraud is a chain of several links, and where a requisite link is missing there is no chain.

The absence of anyone of the elements of fraud is fatal to a recovery.

McNair v. *Finance Co.*, 191 NC 710, 717; 133 SE 85.

There can be no actionable fraud without a concurrence of all the matters deemed to be elements thereof in the particular jurisdiction.

37 C.J.S. 218.

The three North Carolina cases cited in the petition were included in appellant's brief in the Court of Appeals. The language of the opinion in that Court is appropriate:

> "Even if a fiduciary relationship had existed, it would not have eliminated the burden which rested on plaintiff to prove that defendant's statement was made either with knowledge of its falsity or with reckless disregard for its truth." (Petition at p. 4 a.)

CONCLUSION

In the light most favorable to petitioner, the case boils down to one in which upon conflicting evidence the trial Court chose between two permissible views of the weight of the evidence. Hence his findings cannot therefore be disturbed as being "clearly erroneous." (FRCP 52(a)).

United States v. *Yellow Cab Co.*, 338 US 338.

Petitioner, by inference, bases its prayer for relief on the premise that the issuance of policies of hospital

insurance is big business. The protection of the professional reputation of a doctor may not be big business, but certainly it is important business.

It is respectfully submitted that the judgment and decision herein should not be disturbed, and that the petition for certiorari should be denied.

Respectfully submitted,

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